Supreme Court, U.S.
FILED

001552 APR - 9 2001

No. 00-

IN THE

Supreme Court of the United States

PEZOLD, RICHEY, CARUSO & BARKER,

Petitioner,

v.

THE CHEROKEE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian tribe's assertion of sovereign immunity insulate the tribe from court-imposed sanctions for the tribe's misconduct during the litigation?

PARTIES TO THE PROCEEDING

Petitioner

Pezold, Richey, Caruso & Barker is a partnership of professional corporations. These professional corporations have no parent companies or subsidiaries.

Respondent

The Cherokee Nation is a federally recognized Indian tribe.

Cherokee Nation Industries, Inc., an Oklahoma corporation wholly owned by the Cherokee Nation, and Cherokee Nation Enterprises, an Oklahoma corporation wholly owned by the Cherokee Nation, and Terry J. Barker, an individual, were parties to the district court action, but not to this proceeding.

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Petitioner, Pezold, Richey, Caruso & Barker ("PRC&B"), respectfully requests that a writ of certiorari be issued to review the decision of the Oklahoma Court of Civil Appeals, Division III, in this case.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Civil Appeals, Division III ("Court of Appeals"), is reported at *Pezold, Richey, Caruso & Barker v. Cherokee Nation Industries, Inc.*, 18 P.3d 364 (Okla. 2000). (App. A.) In that Opinion, the Court of Appeals reversed the unreported Judgment of the district court. (App. B.)

STATEMENT OF JURISDICTION

The Court of Appeals issued the Opinion on September 1, 2000. A timely petition for rehearing was denied by the Court of Appeals on September 29, 2000. (App. C.) The Oklahoma Supreme Court denied a timely petition for certiorari on January 9, 2001. (App. D.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution provides in relevant part: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

The sole issue in this appeal is whether an Indian tribe can engage in misconduct before a trial court with impunity if claims against it are later dismissed because of tribal sovereign immunity. The issue turns on a question of first impression concerning which doctrine — a court's inherent power to enforce its orders or the doctrine of tribal sovereign immunity — takes precedence when the two doctrines come into conflict. The district court ruled that it had the inherent power to sanction the Cherokee Nation ("CN") for undisputed acts of misconduct, regardless of the tribe's assertion of sovereign immunity. The Court of Appeals reversed the district court, holding that this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), protected the tribe from the consequences of its sanctionable conduct. The Court of Appeals' Opinion involves an unwarranted extension of this Court's decision in *Kiowa*. The Court of Appeals' decision gives an Indian tribe *carte blanche* to commit sanctionable conduct and strips the courts of any power to punish such conduct. Certiorari should be granted to allow this Court to resolve this question of first impression and correctly define the parameters of tribal sovereign immunity.

A. The Proceedings Below

PRC&B brought this action in the state district court to recover fees owed to PRC&B from its representation of CN in various commercial matters. *Pezold, Richey, Caruso & Barker v. Cherokee Nation*, 18 P.3d 364, 365 (Okla. 2000). CN, which is a federally recognized Indian tribe, moved to dismiss the case for lack of subject-matter jurisdiction, asserting tribal sovereign immunity. *Id.* The district court

denied this motion based on Oklahoma law as it existed at the time. *See First Nat'l Bank v. Kiowa, Comanche & Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996); *Aircraft Equip. Co. v. Kiowa Tribe*, 921 P.2d 359, 361-2 (Okla. 1996); *Hoover v. Kiowa Tribe*, 909 P.2d 59, 61-62 (Okla. 1995). In these decisions, the Oklahoma Supreme Court had held that the state courts of Oklahoma had concurrent jurisdiction with tribal courts to decide claims involving commercial agreements between Indian tribes and non-Indians.

During discovery in the action, the district court sanctioned CN for concealing or destroying relevant documents sought by PRC&B. *Pezold*, 18 P.3d at 365. After CN had been sanctioned, this Court decided the case of *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The *Kiowa* case reversed the earlier Oklahoma law on which jurisdiction over CN had been based. *See Carl E. Gungoll Exploration v. Kiowa Tribe*, 975 P.2d 442, 445 (Okla. 1998) (overruling prior Oklahoma law because of *Kiowa*). CN renewed its earlier motion to dismiss for lack of subject-matter jurisdiction, and PRC&B agreed to the dismissal without prejudice of its substantive claims based on the change in Oklahoma law caused by the *Kiowa* case. *Pezold*, 18 P.3d at 365. But PRC&B contended, and the district court agreed, that the district court retained the inherent power to sanction CN for misconduct while before the district court, regardless of whether subject-matter jurisdiction over the substantive claims ultimately existed. *Id.*

CN appealed. CN did not contest that its conduct warranted sanctions and did not dispute the amount of the sanctions. The only basis for its appeal was the argument, based primarily on the *Kiowa* case, that sovereign immunity precluded the imposition of sanctions for its misconduct.

The Court of Appeals agreed with CN. The Court of Appeals held that when a court's inherent powers are in conflict with the doctrine of tribal sovereign immunity, tribal sovereign immunity takes precedence, relying on the *Kiowa* case. *Id.* at 366. As a result, the Court of Appeals held that the district court had no authority to sanction CN for its misconduct, and reversed the judgment. *Id.* PRC&B's timely petition for certiorari to the Oklahoma Supreme Court was denied. (App. D.)

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN A COURT'S INHERENT AUTHORITY AND THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

The Court of Appeals held that when a court's inherent supervisory authority comes into conflict with a claim by an Indian tribe of sovereign immunity, tribal sovereign immunity takes precedence and insulates the tribe from sanctions for its misconduct. This ruling disregards the policies underlying the two doctrines and creates a situation in which a tribal litigant can commit misconduct with impunity.

A court's inherent supervisory authority to issue sanctions and to enforce its orders against litigants has been explicitly recognized by this Court, and this line of cases has been adopted by the Oklahoma courts. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court held that there is a " 'well-acknowledged' inherent power of a

court to levy sanctions in response to abusive litigation practices." *Id.* at 765 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)); *see also Chambers v. Nasco, Inc.*, 501 U.S. 32, 35 (1991) (inherent power to sanction exists in addition to powers created by statute). *Roadway* was later adopted by the Oklahoma Supreme Court as authoritative for the Oklahoma courts. *See Helton v. Coleman*, 811 P.2d 100, 102 (Okla. 1991); *Winters v. City of Oklahoma City*, 740 P.2d 724, 726-7 (Okla. 1987). The Oklahoma district court thus had the inherent power to impose sanctions arising from " 'the control necessarily invested in courts to manage their own affairs' so as to achieve the orderly and expeditious disposition of cases." *Id.* at 726 (quoting *Link*, 370 U.S. at 630).

When the action was originally filed in the district court, there was no conflict between a district court's inherent authority and the doctrine of tribal sovereign immunity under then-existing jurisprudence in Oklahoma. In a series of cases, the Oklahoma Supreme Court had held that sovereign immunity did not preclude jurisdiction over tribes engaged in commercial dealings outside of "Indian country." *See First Nat'l Bank*, 913 P.2d at 301; *Aircraft Equip. Co.*, 921 P.2d at 359; *Hoover*, 909 P.2d at 61-62. While the present case was pending before the district court, however, this Court held that an Indian tribe may claim sovereign immunity in a purely commercial matter involving activities outside Indian country, and this decision was then applied by the Oklahoma Supreme Court. *See Kiowa*, 523 U.S. at 759; *Carl E. Gungoll Exploration*, 975 P.2d at 445. The parties then agreed that the substantive claims should be dismissed based on these new decisions.

Kiowa did not expressly address the issue of whether tribal sovereign immunity took precedence over a court's inherent supervisory authority. The Court of Appeals, however, inferred from *Kiowa* that tribal sovereign immunity extended to insulate an Indian tribe from sanctions for litigation misconduct. The decisions of this Court confirming a court's inherent supervisory authority thus came into direct conflict with the doctrine of tribal sovereign immunity.

CN does not dispute that it committed acts that would have entitled the district court to sanction ordinary litigants. It claims, however, that the inherent supervisory power of the district court cannot reach CN because of tribal sovereign immunity. The Court of Appeals agreed, relying on a decision by the United States Court of Appeals for the First Circuit, *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994). In *Horn*, the court addressed the authority of a federal district court to sanction the federal government for prosecutorial misconduct. The First Circuit held that when the inherent supervisory power of the district court conflicted with the doctrine of sovereign immunity, "[w]e believe that sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation." *Id.* at 764. Relying on *Horn*, the Court of Appeals held in this case that CN could engage in misconduct with impunity because the substantive claims in the case were ultimately dismissed based on tribal sovereign immunity. *Pezold*, 18 P.3d at 366.

The decision in *Horn* should not have been applied to this case. First, *Horn* involved misconduct by the federal government before a federal court. The First Circuit's grounds for its decision — the possible depletion of federal funds, the analogy with state sovereign immunity, and the separation of powers between the judiciary and the executive

branches — are simply inapplicable to the present situation. *See Horn*, 29 F.3d at 765-7. Second, applying *Horn* to the present situation was contrary to public policy. This Court has recognized that implicit in the existence of a judicial system is the power of a court to require parties before it to refrain from abusive litigation practices and to "manage their own affairs' so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). But the effect of the Court of Appeals' decision is to strip the courts of this inherent authority to enforce their rulings and punish misconduct by certain parties, in clear conflict with the teaching of *Link* and *Wabash*. Under the Court of Appeals' decision, an Indian tribe may engage in the most egregious misconduct — including the destruction of evidence — and the courts are powerless to prevent or punish it.

The petition for certiorari should be granted to address this conflict between the two doctrines of inherent judicial authority and tribal sovereign immunity. The conflict presents a pure question of law that has not previously been addressed in any case identified by the parties. The sole case identified in the appeal as addressing the conflict between inherent authority and sovereign immunity is factually dissimilar, because it involved the conflict between the authority of a federal district court and the federal government's sovereign immunity. Furthermore, the question is clearly one of substance. Because of the many Indian tribes now engaged in commercial and other activities outside of "Indian Country," the issue is one that is likely to recur, and this case presents a valuable opportunity for the Court to provide guidance to the lower courts.

II.

THE PETITION SHOULD BE GRANTED TO CORRECT AN UNWARRANTED EXTENSION OF THIS COURT'S OPINION IN *KIOWA*.

The Court of Appeals' decision was based on an extension of the *Kiowa* case that was so broad as to eliminate any authority of the courts to punish misconduct by an Indian tribe that appears before them. Nothing in *Kiowa* warranted this extension of tribal sovereign immunity, and certiorari should be granted to define the proper parameters of the doctrine.

In *Kiowa*, the Court noted that the doctrine of tribal sovereign immunity is a judicially created doctrine that "developed almost by accident." 523 U.S. at 756. While the Court recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," the Court chose not to limit the doctrine out of deference to Congress, which " 'has always been at liberty to dispense with such tribal immunity or to limit it.' " *Id.* at 759 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991)). As a result of these considerations, the Court was unwilling to draw a distinction between commercial and governmental activities of a tribe for purposes of tribal sovereign immunity. *Id.* at 754-5.

None of the grounds for decision in the *Kiowa* case apply in the present case. The doctrine of inherent judicial authority is, like tribal sovereign immunity, a judicially created doctrine. Nothing in *Kiowa* suggests that this Court has defined tribal sovereign immunity so broadly that it eliminates or reverses the Court's prior decisions recognizing

a court's inherent authority to punish misconduct by parties before it. Nor is there any ground for asserting that Congress has intended, either overtly or by inaction, to allow Indian tribes to commit sanctionable acts in the courts with impunity.

Furthermore, the Court of Appeals' extension of the *Kiowa* case puts the courts in an intolerable situation when waiver of sovereign immunity becomes an issue. As *Kiowa* expressly recognized, an Indian tribe may waive sovereign immunity so as to subject itself to state-court jurisdiction. 523 U.S. at 754. Under the improper extension of *Kiowa* in this case, however, if a tribe chooses to conceal or destroy the documents containing that waiver, a state court is powerless to impose sanctions for destruction of the very documents that, if produced, would prove that the court had jurisdiction. By disregarding this Court's decisions concerning a court's inherent authority and extending Indian sovereign immunity well beyond any previously recognized bounds, the Court of Appeals has made it impossible for the courts to manage issues of waiver and sovereign immunity. The inherent power of a court to sanction a party for abusive litigation practices remains fundamentally necessary for the orderly management of a court system, even if there is a possibility that the court may ultimately lose jurisdiction.

This Court has previously recognized the necessity of courts retaining the ability to sanction parties for misconduct despite a later loss of jurisdiction. In a closely analogous case, *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), this Court held that sanctions could be imposed on a party under Federal Rule of Civil Procedure 11 even when the district court was later held to be without subject-matter jurisdiction. *Id.* at 139. In *Willy*, the plaintiff was sanctioned for abuse of

the litigation process. The case was then remanded to state court after it was determined that there was no federal subject-matter jurisdiction. The Court noted that

> [a] final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. *But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under a misapprehension that it had jurisdiction.*

Id. at 137 (emphasis added). The *Willy* decision held that a court's authority to decide issues collateral to the merits and its "interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction." *Id.* at 139. Accordingly, this Court upheld the imposition of sanctions even when subject-matter jurisdiction was ultimately lacking. *Id.*

There is an exact parallel between *Willy* and the present case — the district court was under a "misapprehension that it had jurisdiction" over the substantive claims against CN based on commercial activities outside of "Indian country." After the *Kiowa* case was decided, it was clear that there was no such jurisdiction over the substantive claims in the case. But the ultimate loss of jurisdiction should have had no effect on the district court's authority to punish CN for misconduct that occurred while the court believed it had jurisdiction. The Court of Appeals' overbroad reading of *Kiowa* disregarded the important policy grounds supporting a court's inherent authority, grounds that remain applicable even if a court ultimately loses subject-matter jurisdiction.

CONCLUSION

The Oklahoma Court of Appeals' ruling misapplied this Court's decision in *Kiowa*, and thereby stripped the courts of the authority to punish otherwise sanctionable conduct. This unwarranted extension of tribal sovereign immunity is contrary to the decisions of this Court recognizing a court's inherent authority to manage litigation before it and to respond to abusive litigation tactics. Because this case presents a significant legal question of first impression and provides an opportunity to give the lower courts guidance as to the extent of tribal sovereign immunity, the petition for certiorari should be granted.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III DATED AND FILED SEPTEMBER 1, 2000

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

Case Number 94,054

PEZOLD, RICHEY, CARUSO & BARKER,
a partnership of professional corporations,

Plaintiff/Appellee,

versus

CHEROKEE NATION INDUSTRIES INC., an Oklahoma corporation, CHEROKEE NATION ENTERPRISES, an Oklahoma corporation,

Defendants,

and

THE CHEROKEE NATION, a federally recognized Indian Tribe,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

Appendix A

HONORABLE GREGORY K. FRIZZELL,
TRIAL JUDGE

* * *

OPINION

Opinion by CAROL M. HANSEN, Vice-Chief Judge:

¶1 Defendant/Appellant, Cherokee Nation, seeks review of the trial court's order granting judgment against it and in favor of Plaintiff/Appellee, Pezold, Richey, Caruso & Barker (Pezold), for attorney fees as discovery sanctions. We reverse, holding Cherokee Nation's sovereign immunity protects it from a state court's exercise of inherent powers.

¶2 Pezold, a law firm, sued Cherokee Nation in state district court to recover fees arising from its representation of the tribe in certain commercial matters. Cherokee Nation specially entered its appearance and moved to dismiss, claiming sovereign immunity. The trial court denied the motion and the parties proceeded with discovery. Pezold moved to compel Cherokee Nation to produce certain documents and later sought sanctions against Cherokee Nation for discovery violations. On November 11, 1997, the trial court granted Pezold's motion for sanctions and directed it to file an application for fees and costs connected with its motion to compel, motion for sanctions, and its search for the documents Cherokee Nation failed to produce.

¶3 On May 26, 1998, the U.S. Supreme Court handed down its decision in *Kiowa Tribe of Okla. v. Manufacturing*

Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), holding Indian tribes enjoy immunity from suit on contracts, whether the contracts involve governmental or commercial activities and whether they were made on or off a reservation. Cherokee Nation again moved for dismissal based on sovereign immunity. Pezold agreed to dismissal without prejudice but asserted its right to recover under the sanction order continued. The trial court agreed and heard Pezold's application for attorney fees and costs.

¶4 On November 17, 1999, the trial court entered a judgment for Pezold against Cherokee Nation in the amount of $32,688.40 as fees and costs resulting from Cherokee Nation's discovery violations. Cherokee Nation appeals from that order, contending the trial court lacked authority to impose sanctions against it because (1) the U.S. Constitution and federal case law reserve to the federal government plenary authority over it, and (2) it possesses federal common law immunity from suit.

¶5 Pezold responds the court's inherent power to sanction abusive litigation practices is not lost simply because a case is ultimately dismissed for lack of subject matter jurisdiction, citing *Willy v. Coastal Corp.*, 503 U.S. 131, 137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992). In *Willy*, a former employee sued his employer for wrongful discharge, and the employer removed the action to federal court. The court dismissed the action for failure to state a claim and imposed Rule 11 sanctions based on conduct in the case. On appeal, the Fifth Circuit Court of Appeals determined the district court lacked subject matter jurisdiction but upheld the sanctions award. In a second

appeal, the Fifth Circuit concluded a federal court could exercise its inherent power in imposing Rule 11 sanctions even in the absence of subject-matter jurisdiction. The U.S. Supreme Court affirmed, stating,

> A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.

503 U.S. at 137.

¶6 The facts in *Willy* did not, however, implicate sovereign immunity. In *U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994), the Court confronted the conflict between the doctrines of sovereign immunity and inherent or supervisory power. The federal district court had assessed attorney fees and costs against the United States for "egregious acts of prosecutorial misconduct" in a criminal prosecution. *Id.* at 770. The government appealed, contending sovereign immunity prohibited the award of fees and costs against it. The First Circuit agreed and reversed the award, stating,

> [W]e believe that sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation. The critical determinant is that the doctrines are of fundamentally different character: supervisory powers are discretionary and carefully circumscribed; sovereign immunity is mandatory

> and absolute. Consequently, whereas the former may be invoked in the absence of an applicable statute, the latter must be invoked in the absence of an applicable statute; and whereas the former may be tempered by a court to impose certain remedial measures and to withhold others, the latter must be applied mechanically, come what may. In other words, unlike the doctrine of supervisory power, the doctrine of sovereign immunity proceeds by fiat: if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity.

Id. at 764.[1]

¶7 *Horn* involved the sovereign immunity of the federal government, whereas here the sovereign immunity of a tribe is invoked. However, under *Kiowa Tribe*, 523 U.S. at 754, 118 S.Ct. at 1702, we are similarly bound to honor that immunity in the absence of Congressional or tribal waiver. Therefore, we hold Cherokee Nation's sovereign immunity protects it from a state court's exercise of inherent powers.

¶8 Pezold cites *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1995), *Omaha Indian Tribe v. Tract I*, 933 F.2d 1462, 1471 (8th Cir. 1991), and *U.S. v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1251

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1. In 1997, Congress passed the Hyde Amendment, Pub.L. No. 105-119, to amend 18 U.S.C. §3006A, waiving sovereign immunity for attorney fees related to prosecutorial misconduct.

(9th Cir. 1988) as authority for the proposition that a court's inherent power to impose sanctions in a case in which there is ultimately no subject matter jurisdiction applies with equal force when jurisdiction is lost because of sovereign immunity. The first case involved a matter in which the Republic of Philippines was a plaintiff. The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq., which controls the courts' authority over foreign sovereigns, is inapplicable to federally recognized Indian tribes. In the second case the trial court dismissed the plaintiff tribe's quiet title action as a sanction for not complying with the court's orders. The tribe's sovereign immunity was not at issue. In the third case, the Ninth Circuit upheld Rule 11 sanctions against the federal government, citing other Ninth Circuit cases which viewed the sanctions as authorized against the federal government by the Federal Rules of Civil Procedure. The court's inherent powers were not at issue. None of these cases addressed the conflict between the doctrines of inherent powers and sovereign immunity, as did the First Circuit in *Horn*.

¶9 Accordingly, the trial court's order granting judgment against Cherokee Nation for attorney fees and costs as discovery sanctions is **REVERSED.**

ADAMS, J., and JOPLIN, J., concur.

APPENDIX B — JOURNAL ENTRY OF JUDGMENT OF THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA DATED NOVEMBER 16, 1999 AND FILED NOVEMBER 17, 1999

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

Case No. CJ-97-00427
(The Honorable Gregory K. Frizzell)

PEZOLD, RICHEY, CARUSO AND BARKER, a Partnership of Professional Corporations,

Plaintiff,

vs.

CHEROKEE NATION INDUSTRIES, INC., an Oklahoma Corporation, CHEROKEE NATION ENTERPRISES, an Oklahoma Corporation and CHEROKEE NATION,

Defendants,

vs.

TERRY J. BARKER,

Third-Party Defendant.

JOURNAL ENTRY OF JUDGMENT

Appendix B

The Court has for its consideration Plaintiff's Application for Attorneys' Fees filed October 16, 1997, and Plaintiff's Supplemental Application for Attorneys' Fees and Expenses filed December 2, 1998. The Court, having fully reviewed the applications, the evidentiary material supplied in support of the applications, as well as this Court's Order of September 24, 1997 (filed November 12, 1997), and being well and fully advised in the premises, hereby finds that by Order dated September 24, 1997, Plaintiff's Motion for Discovery Sanctions Against Cherokee Nation was granted. Under the terms of that Order, plaintiff was awarded all fees and costs incurred in connection with the (i) filing and prosecution of the Motion to Compel and Motion for Discovery Sanctions; and (ii) the search for the documents which Cherokee Nation failed to produce. Pursuant to the terms of that Order, plaintiff was granted leave to file an application with respect to such fees and costs. Cherokee Nation has not challenged the amount of the fees and expenses requested but contends that this Court is without jurisdiction to impose sanctions against it.

The Court further finds that the application and supplemental application are fully supported by affidavits and other evidentiary materials and that the fees and costs requested are reasonable and properly awarded pursuant to the Order granting sanctions against Cherokee Nation.

IT IS THEREFORE ORDERED that plaintiff is awarded fees and costs against Cherokee Nation in the amount of $32,688.40 as a result of Cherokee Nation's discovery violations.

Appendix B

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case has been resolved as to all claims by and between plaintiff, and defendant, Cherokee Nation. The Court finds that there exists no just reason for delay in the entry of final judgment as to the sanction award. Therefore, Final Judgment is entered in favor of plaintiff and against Cherokee Nation as set forth in this Judgment.

DATED this 16th day of November, 1999.

s/ GREGORY K. FRIZZELL
GREGORY K. FRIZZELL
DISTRICT JUDGE

APPENDIX C — ORDER OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION 3 DATED SEPTEMBER 28, 2000 AND FILED SEPTEMBER 29, 2000

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS

DIVISION 3
September 28, 2000

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

94,054 – Pezold, Richey, Caruso & Barker, a partnership of professional corporations, Plaintiff/Appellee v. Cherokee Nation Industries Inc., an Oklahoma corporation, Cherokee Nation Enterprises, an Oklahoma corporation, Defendants, and The Cherokee Nation, a federally recognized Indian Tribe, Defendant/Appellant.

Appellee's Petition for Rehearing is *DENIED*.

* * *

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 28th day of September, 2000.

s/ Carol M. Hansen
CAROL M. HANSEN,
Vice-Chief Judge

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED JANUARY 9, 2001

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, January 9, 2001

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

94,054 Pezold, Richey, Caruso & Barker v. Cherokee Nation Industries, Inc., et al.

Petition for certiorari is denied.

CONCUR: Watt, V.C.J., Hodges, Lavender, Kauger, Summers, Boudreau, JJ.

CONCURS BY REASON OF STARE DECISIS: Winchester, J.

DISSENT: Hargrave, C.J., Opala, J.

* * *

s/ Joseph M. Watt
ACTING CHIEF JUSTICE

Supreme Court, U.S.
FILED
MAY 30 2001
OFFICE OF THE CLERK

No. 00-1552

In The

Supreme Court of the United States

PEZOLD, RICHEY, CARUSO & BARKER,

Petitioner,

v.

THE CHEROKEE NATION,

Respondent.

On Petition For A Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Oklahoma appellate court correctly held that a federally recognized Indian tribe may not be assessed attorney fees in a state district court action where the tribe had not waived its sovereign immunity, and the court action itself was dismissed.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Cherokee Nation, by and through A. Diane Hammons, Director of the Justice Department of the Cherokee Nation, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the decision of the Oklahoma Court of Civil Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Civil Appeals is recorded at *Pezold, Richey, Caruso & Baker v. Cherokee Nation Industries, Inc.*, 18 P.3d 364, 2001 OK CIV APP 13.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Pezold, Richey, Caruso & Barker (hereinafter "Law Firm") sued the Cherokee Nation (hereinafter "Nation") in a state district court in an attempt to recover attorney fees it claimed were owed based upon alleged representation of the Nation during the tenure of Joe Byrd as principal chief. The Nation entered a special appearance and moved to dismiss based upon sovereign immunity, which the state district court denied. After this Court's

decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.3d.2d 981 (1998) the Law Firm agreed to a dismissal without prejudice but continued its assertion that it was due attorney fees based upon alleged violations by the Nation during the discovery process. The state trial court agreed with petitioner, and assessed costs against the Nation in the amount of $32,688.50 as fees and costs resulting from the alleged discovery violations. The Nation appealed, and the Oklahoma appellate court reversed the lower court's order holding that the Nation's sovereign immunity protected it from the assessment of costs. The Oklahoma Supreme Court denied certiorari.

SUMMARY OF THE ARGUMENT

The Court of Civil Appeals correctly held that the Cherokee Nation's sovereign immunity protected it from fees and costs assessed in a state district court action which was ultimately dismissed based on its initial special appearance and plea of sovereign immunity. The petitioner now asks this Court to grant certiorari review to review the propriety of the state appellate court's decision.

REASONS FOR REFUSING TO GRANT THE WRIT

I. THE STATE DISTRICT COURT'S IMPROPER IMPOSITION OF FEES AGAINST AN INDIAN TRIBE DOES NOT PRESENT A FEDERAL QUESTION "BETWEEN A COURT'S INHERENT AUTHORITY AND THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY."

Petitioner Law Firm disagrees with the decision of the Oklahoma appellate court, and asks this Court to act as a super-appellate court and review the state court's ruling. In so doing, Law Firm attempts to characterize the trial court's imposition of costs against the Nation as an exercise of "inherent authority" which, Law Firm claims, is in conflict with the doctrine of tribal sovereign immunity.

In assessing costs against the Nation, the Tulsa County district judge did not allege that he had the power to do so, in the face of tribal sovereign immunity, because of his "inherent judicial authority." Indeed, he did not address the basis for his ruling at all. Appendix B, Petition for Writ of Certiorari, p. 8a. The same judge had previously overruled the Nation's motion to dismiss based upon sovereign immunity.

Under Title 12, Okla.Stat., § 3237(A)(4), the district court may award expenses, including attorney fees, for discovery violations. Thus, the district court may have been acting under a specific statutory provision of state law, and not acting under its inherent or supervisory judicial power. Ordinarily, in Oklahoma, attorney fees may not be recovered in the absence of an agreement or

statutory authority. *Globe & Republic Insurance Co. v. Independent Trucking Co.*, 387 P.2d 644 (Okla. 1963). However, when a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court may, in the exercise of its inherent equitable powers, award attorney fees. *City National Bank & Trust Co. v. Owens*, 565 P.2d 4 (Okla. 1977). Here, the district court's order did not recite any finding of bad faith or wanton or oppressive conduct. Appendix B, Petition for Writ of Certiorari, p. 8a. Therefore, the Oklahoma Court of Civil Appeals could have held that the district court's imposition of fees was statutorily based, and was not an exercise of inherent authority. As such, it was clearly overridden by the Nation's sovereign immunity.

The Oklahoma appellate court, in making its determination that the Tulsa district court improperly imposed fees against the Nation held that, under *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), the Nation was protected by sovereign immunity from a "**state** court's exercise of inherent powers." Appendix A, Petition for Writ of Certiorari, p. 5a, emphasis added. This was not a departure of law, and was clearly mandated by the long line of federal and Oklahoma cases recognizing tribes' sovereign immunity.

As the Oklahoma Supreme Court recently reiterated in *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 2 P.3d 338, 2000 OK 27 (Okla. 2000), "The doctrine of res judicata is a state-created one. . . . State res judicata jurisprudence is, however, as is all state-created law, subordinate to federal constitutional principles, e.g., due process. Id. To here allow state judicial intrusion into the sovereign tribal

coffers by reason of the state procedural doctrines of res judicata or collateral estoppel would clearly diminish the federally mandated sovereign immunity by reason of state law, contrary to *Manufacturing*." The State's highest court ruled that the state law principles of res judicata and collateral estoppel could not overcome sovereign immunity. Thus, the intermediate appellate court's ruling here that a state award of attorney fees could not overcome sovereign immunity was sound.

II. THE STATE COURT'S RULING DID NOT EXTEND THE HOLDING IN *KIOWA*, AND WAS MERELY A REITERATION OF WELL ESTABLISHED PRINCIPLES OF SOVEREIGN IMMUNITY.

In its second reason for granting the writ, Law Firm attacks Indian sovereignty, calling it a "judicially created doctrine," and argues that the state appellate court extended the notion of sovereignty "so broad as to eliminate any authority of the courts to punish misconduct by an Indian tribe that appears before them." Petition for Writ of Certiorari, p. 8. First, a court may punish misconduct by any Indian tribe that is properly before it as a result of a waiver of sovereign immunity. Second, it must be noted that the same argument was made against the United States in the decision of *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994). The First Circuit rejected that argument, noting that the court still maintained control over attorneys appearing before it, and could sanction them. 29 F.3d at 766-767.

The inherent sovereignty of Indian tribes was not created by the United States courts, nor by any courts. "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 507 (1991).

United States courts have recognized sovereignty, but did not create it. Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977). This aspect of tribal sovereignty is subject to the superior and plenary control of Congress. Without congressional authorization, the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, supra, 309 U.S., at 512, 60 S.Ct. at 656.

In the Tulsa County case, the Nation was exempt from suit, as it maintained from the beginning of the litigation. Had the state district court correctly followed the law, and dismissed the suit immediately based on sovereign immunity, there would have been no discovery violations. The Nation was exempt from suit, and it was correspondingly exempt from any award of attorney fees. Law Firm should not have been allowed to collect from the back door what it could not from the front door. This

premise is not novel. Except to the extent it has waived its immunity, the United States Government is immune from claims for attorney's fees. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3278, 77 L.Ed.2d 938 (1983). Waivers are strictly construed in favor of the sovereign. Here, the Nation did not waive its sovereign immunity to be sued, nor to have fees assessed. The Oklahoma appellate court was correct in holding that sovereign immunity barred the imposition of fees against the Nation.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because no new questions of federal import are involved, the Oklahoma appellate court merely applied long-standing principles of law enunciated by this Court.

Respectfully submitted,

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